United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7153

No. 75-7153

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NO. 75-7153

RUTH JOHNSON, ET ALS.,

PLAINTIFFS-APPELLANTS,

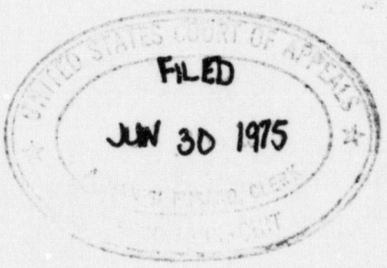
vs.

HENRY C. WHITE,
COMMISSIONER OF WELFARE,
STATE OF CONNECTICUT,

DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFFS-APPELLANTS



David M. Lesser
William H. Clendenen, Jr.
CLENDENEN & LESSER
152 Temple Street
New Haven, Connecticut

Douglas Crockett
Dennis O'Brien
P. O. Box D
Willimantic, Connecticut

Attorneys for Plaintiffs-
Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

RULES AND REGULATIONS:

STATUTES:

BOOKS AND ARTICLES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7153

RUTH JOHNSON, ET ALS.,

PLAINTIFFS-APPELLANTS,

vs.

HENRY C. WHITE,
COMMISSIONER OF WELFARE,
STATE OF CONNECTICUT,

DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT, BLUMENFELD, J.

BRIEF OF PLAINTIFFS-APPELLANTS

Statement of Issues

1. Where the Connecticut State Welfare Department created a standard of need by consolidating and averaging budgeted amounts bearing no relation to recipients' needs,

did the Department violate 42 U.S.C. §602(a)(23)?

2. Where the U.S. City Average Consumer Price Index understated changes in Connecticut's cost of living, did the Connecticut State Welfare Department's use of said index in creating a standard of need violate 42 U.S.C. §602(a)(23)?

3. Where the Connecticut State Welfare Department created a standard of need pursuant to improper statistical and mathematical procedures, did the Department violate 42 U.S.C. §602(a)(23)?

4. Where the district court's consolidation of the trial on the merits with the Department's motion to modify the preliminary injunction occurred without notice to the recipients, and to their prejudice, should this Court remand the cause for a new trial?

Statutes Involved

Title 42 U.S.C. §602(a): "A State plan for aid and services to needy families with children must...

> "(7)except as may be otherwise provided in clause (8), provide that the State agency shall in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same

> home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;
>
> "(23) provide that by July 1, 1969, the amounts used by the State to determine the need of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

Statement Of The Case

The plaintiffs-appellants, welfare recipients pursuant to the aid to families with dependent children program (AFDC), see 42 U.S.C. §§601 et seq., 602(a)(23), instituted this class action after the defendant-appellee welfare commissioner decided

> "to convert virtually the entire AFDC program to a 'flat grant' system, effective November 1, 1971. The proposed system, entitled the Connecticut Family Assistance Plan (CFAP), was designed to simplify AFDC payments by averaging the budgeted needs of each size of assistance unit and by making identical payments to every family within each size of assistance unit on the basis of this consolidated standard of need."
>
> App. 51a

In October 1971, the district court preliminarily enjoined the Connecticut State Welfare Department from implementing CFAP's standard of need and a proposed fifteen percent payment reduction. App. 26a, 51a. Recognizing the Department's power to set the level of benefits, App. 28a, the district court nevertheless found that the recipients had "raised substantial questions going to the merits," App. 36a, of a violation of 42 U.S.C. §602(a)(23). Reasoning that the recipients "will suffer irreparable injury if the proposed FAP is implemented," App. 32a, the court explained:

> "The effect of a proper computation of the standard of need may well be to raise it. This court is not required to assume that, simply because the state has the power to lower the level of benefits even further, it will do so. As the Supreme Court has stated, while §602(a)(23)
>
> > " 'leaves the States free to effect downward adjustments in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a State to accept the political consequence of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable.' Rosado, supra, 397 U.S. at 413.'
>
> "Even assuming that a proper computation of the standard of need raises it and that the state nonetheless chooses to reduce the level of benefits paid in order to conform with budgetary requirements, this case is something

> more than "a meaningless exercise in 'bookkeeping.' " Id. A proper computation of the standard of need may well result in unequal variations in the standards for the different family sizes. That is, a recomputation may effect a 10% rise in the standard of need for a family of four, while only a 3% rise would be mandated for a family of three. In this event, the dollar amounts of the proposed levels of benefits would not remain the same, even if the percentage reduction were increased. Some recipients might well receive higher payments than those proposed, even within the present budgetary limitations of the Department of Welfare."
>
> App. 31a-32a

After entry of the preliminary injunction,[1] the Department of Health, Education and Welfare (HEW) entered the case as amicus curiae. App. 51a, 68a. HEW assisted the Department in developing a revised CFAP which HEW approved in its brief filed April 3, 1972.[2] App. 51a.

---

[1] On December 7, 1971, the district court found that the Department had acted "in violation of the preliminary injunction of October 28, 1971." App. 41a, 37a.

[2] HEW's brief has been filed with this Court.

The Department subsequently moved to dissolve the district court's preliminary injunction, App. 43a, 45a, and represented to the district court that it would "continue the level of payments to recipients at 100% of need." App. 52a. In June 1972, the district court not only dissolved the preliminary injunction, but also entered judgment for the Department. App. 47a, 52a, 61a, 62a. The recipients then moved, pursuant to Rules 52, 59, 60 and 62, F.R.Civ. P., to reopen the judgment, present further evidence, and for HEW to review the recipients' evidence submitted after the filing of HEW's brief. App. 63a-69a. The court reserved decision on these motions in view of ongoing settlement negotiations between the recipients and the Department, App. 7a, 63a, which proved fruitless. On February 10, 1975, the district court denied the recipients' motions in all respects, App. 7a, 63a. The recipients filed their notice of appeal on February 20, 1975. App. 71a.

A R G U M E N T

I. THE CONNECTICUT FAMILY ASSISTANCE PLAN'S STANDARD OF NEED CONSOLIDATES BUDGETED AMOUNTS BEARING NO RELATION TO RECIPIENTS' NEEDS. THE CONNECTICUT FAMILY ASSISTANCE PLAN THEREFORE VIOLATES 42 U.S.C. §602(a)(23).

The Connecticut State Welfare Department constructed CFAP's consolidated standard of need by surveying and averaging the needs, as quantified and budgeted by the Department, of a random sampling of AFDC recipients. App.52a,53a. It is axiomatic that such a survey and averaging is permissible only "so long as the total amount of the payment for each item corresponds to the extent of the need for that item in the total caseload." Rosado vs Wyman, 322 F. Supp. 1173, 1182 (E.D. N.Y. 1970), affirmed, 437 F. 2d. 619 (2nd Cir. 1970), affirmed, 402 U.S. 991 (1971). CFAP thus rests on the bedrock assumption that "past payment was proof of need". Rosado vs Wyman, supra, 437 F. 2d at 628.

Yet CFAP's redefined standard "obscure(s) the actual standard of need," Rosado vs Wyman, supra, 397 U.S. 397, 413 (1970), by consolidating budgeted amounts which do not constitute "proof of need." For a significant number of recipients, budgeted payments were not "based on the ...amount

of assistance needed," 45 C.F.R. §233.20(a)(3)(viii); nor was "the determination of need and amount of assistance for all applicants and recipients...made on an objective and equitable basis." 45 C.F.R. §233.20(a)(1). Rather, their budgets reflected, not need at all, but a system of maximum grants, outside income contributions, and illegal income presumptions.

CFAP thus frustrates the essential purpose of §602(a)(23): to bring "to light the true extent to which actual assistance falls short of the minimum acceptable." Rosado vs Wyman, supra, 397 U.S. at 413. On remand this Court should require the Department to exclude from the consolidated standard budgeted amounts which do not constitute "proof of need."[3]

---

[3] The budgeted amounts, not equivalent to need, which the Department erroneously included in the survey, averaging, and consolidation are discussed at pages 9-16, infra. Such amounts are readily identifiable from Defendant's computer program, and can thus be excluded from any revision of the consolidated standard.

If this Court holds that CFAP erroneously included these budgeted amounts, 42 U.S.C. §602(a)(23)does not require the Department to raise benefit levels equivalent to a revised consolidated standard of need. Rosado vs Wyman, supra.

A. CFAP's STANDARD OF NEED CONSOLIDATES BUDGETED AMOUNTS BASED, NOT UPON NEED, BUT UPON MAXIMUM GRANTS.

The district court found that:

> "where the assistance unit resides with a stepfather, the shelter allowance is budgeted on the basis of a prorated share of actual rent, or a prorated share of the maximum rent standard for private housing in the community, whichever is less... Where assistance units reside with legally liable relatives or non-legally liable relatives or friends, the shelter allowance is also determined in this way...Ordinarily, the prorated share of the private housing standard is lower, and thus is the amount budgeted for rent. (Emphasis supplied). App. 55a, 56a.

Pursuant to pre-CFAP policy, the "private housing standard"

> "is founded upon rates negotiated with 18 different housing authorities for low cost public housing. The low cost housing rates for each of these housing authorities vary in accordance with a combined concept of room size and family size and include the cost of heat and utilities. The standards for private housing are established by adding a 10 percent differential to the low cost public housing rates where the private housing is unfurnished with an increment of an additional 10 percent if the private housing is furnished."
>
> Brief Amicus Curiae of The Department of Health, Education, and Welfare, filed in United States District Court for District of Connecticut (hereinafter "HEW Brief"), pp. 6-7.

HEW recognizes

> "that the numerous figures listed for private housing in each housing authority area in reality represent individual shelter maximums." Id. at 7.

These shelter maximums do not reflect the cost of shelter in the private market, since "[t]he rents in low-cost public housing bear little relationship to market realities".[4] App. 33a.

The district court also found that:

> "Where AFDC children live with non-needy, non-legally liable relatives, shelter maximums are budgeted at the rate of $20 per month for one child, $30 per month for two children, and $40 per month for three or more children...The defendant also defines actual need for these recipients at that rate; that is, there is no indication that, in the housing survey..., the defendant inquired as to whether such recipients were actually charged more for rent."
>
> App. 55a. (Emphasis supplied).

---

[4] For example, the private housing standards for geographically contiguous towns frequently differ significantly. In Preston, the maximum rental rate of $73 for an unfurnished apartment of 4 1/2 rooms is based upon the Norwich public housing rate. But in Ledyard, which is contiguous to Preston, budgeted rentals are based upon the public housing rate in New London and the maximum rent is $103.00 for a four-room unfurnished apartment. Similarly, for a four-room apartment in Cheshire, the $70 budgeted maximum is based on Waterbury public housing rates; but in Hamden, contiguous to Cheshire, the $112 maximum for comparable housing derives from New Haven rates. App. 110a-113a.

Inclusion in CFAP, of amounts based on maximums or prorations of maximums, aborts the purpose of a realistic, accurately determined standard of need: to bring "to light the true extent to which actual assistance falls short of the minimum acceptable." Rosado vs Wyman, supra, 397 U.S. at 413. Section 602(a)(23) prohibits creation of a need standard from an averaging of budgeted maximums, because such "maximums establish the upper limit [of payment] irrespective of how far short the limitation may fall of the theoretical standard of need." Rosado vs Wyman, supra, 397 U.S. at 409. Maximums are solely a method of reducing payments which would otherwise equal recipients' needs. 45 C.F.R. §233.20(a)(3)(viii). To qualify for inclusion in the consolidated need standard, budgeted amounts must be based, not on maximums, but on the "amount of assistance needed." (Emphasis supplied). Id. Clearly 42 U.S.C. §602(a)(23) bars the Department from consolidating the need standard by averaging a melange of shelter maximums.[5]

---

5 App. 117a et seq. demonstrates the substantial difference in budgeted awards between assistance units equal to household size, and units residing in households at least one of whose members does not receive AFDC. This difference results from the fact that awards to the latter class of units were based, not upon need, but upon the above-described system of maximum grants, and presumptions as to the availability of income, infra at pages 12-15. At trial, the recipients demonstrated that this difference was so striking as to render the two classes of units statistically distinct populations. App. 53a-54a. The difference in budgeted awards between the two classes, within a given assistance unit size, nearly equals the difference in budgeted awards between two assistance unit sizes.

B. CFAP'S CONSOLIDATED NEED STANDARD INCLUDES BUDGETED AMOUNTS REFLECTING, NOT NEED, BUT THE DEDUCTION FROM NEED OF INCOME DEEMED AVAILABLE TO THE ASSISTANCE UNIT.

Inclusion in CFAP of amounts based on the Department's system of shelter maximums is illegal for still another reason. The Department's pre-CFAP methods for determining need created two classes of AFDC recipients. The budgeted needs of both such classes were averaged into CFAP's consolidated standard. App. 53a,55a-56a. The shelter and utility budgets of one class, households consisting entirely of AFDC recipients, were equivalent to need. Budgeted needs of the second class, households one or more of whose members did not receive AFDC assistance, were based, not on need, but upon the system of maximum grants described, supra. The sole basis for this distinction is the presence in the household of a non-recipient who may contribute nothing to the assistance unit's support.[6] Compare, VanLare v Hurley, 43 U.S.L.W. 4592 (1975).

The premise for this differential is that outside income is "assumed to be available" to assistance units residing with non-recipients. Solman vs Shapiro, 300 F. Supp. 409, 415 (D. Conn. 1969), affirmed, 396 U.S. 5 (1969). See, e.g.

---

6 Even legally liable relatives have no duty of contribution if their income is below the required contribution scale, 45 C.F.R. §233.20(a)(3)(vi).

VanLare vs. Hurley, supra; King vs Smith, 392 U.S. 309 (1968); Lewis vs Martin, 397 U.S. 552 (1970); Marotti vs White, 342 F. Supp. 823 (D. Conn. 1972); Mothers and Childrens Rights Organization vs Stanton, 371 F. Supp. 298 (N.D. Ind. 1973). The budgets of such units thus reflect not "the amount of assistance needed," 45 C.F.R. §233.20(a)(3)(viii), but the deduction from the need standard of "any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. §602(a)(7). See, Shea vs Vialpando, 416 U.S. 251, 253-254 (1974). Such budgeted amounts, not equivalent to need, must therefore be excluded from CFAP's consolidated need standard. Rosado vs Wyman, supra.

For identical reasons, inclusion in CFAP's consolidated need standard of budgeted shelter awards of zero, see App. 56a,65a,68a-69a, is illegal. Since all AFDC units have a need for shelter, a zero budgeted award simply indicates that the need for shelter is met by a source other than the Department. See, e.g., App. 95a, demonstrating that the recipient's shelter was "provided", not by the Department, but in some other manner.[7] For each assistance

---

[7] In Connecticut, pursuant to HEW regulations, the Department must establish the assistance units AFDC budget by first determining "the amount of assistance needed". 45 C.F.R. §233.20(a)(3)(viii) (emphasis added). The Department must then determine the assistance payment by subtracting from "the amount of assistance needed" all income and resources whether in cash or in kind, available to the unit for meeting that need. 45 C.F.R. §233.20(a)(3)(ii); 42 U.S.C. §602(a)(7). Inclusion of zero rents in CFAP reflects the Department's failure to observe the first step in this budgeting process.

unit size, the following numbers of zero shelter budgets were included in CFAP's survey and averaging:

ZERO RENT TABLE [8]

ASSISTANCE UNIT (A.U.)	A.U. Sample Size	Number O Awards	%
1	312	33	10.58
2	458	12	2.62
3	466	20	4.29
4	469	9	1.92
5	541	11	2.03
6	450	6	1.33
7	197	3	1.52
8	96	1	1.04
9	51	1	1.96
10	21	0	0
11	9	0	0
12	5	0	0
13	2	0	0
14	1	0	0
15	1	0	0

[8] See, Appendix 3, Exhibit D of HEW Brief, (Defendant's Exhibit 16). HEW's brief contains a typographical error regarding unit size three, stating that 466 units had shelter awards. The correct number is 446 (Defendant's Exhibit 16).

C. CFAP'S CONSOLIDATED NEED STANDARD INCLUDES BUDGETED AMOUNTS PREMISED UPON ILLEGAL INCOME PRESUMPTIONS.

There is a final compelling reason for excluding budgeted shelter maximums from the consolidated standard of need. "The use of grants based upon irrebuttable presumptions in the computation of the consolidated standard is impermissible." Roselli vs Affleck, 373 F. Supp. 36, 46 (D.R.I. 1974). Affirming, the First Circuit held: "(T)he state ought not to be allowed to premise the calculation of the flat grant on an unlawful attribution of income policy." 508 F.2d 1277, 1282 (1st Cir. 1974). CFAP's consolidated need standard is based precisely upon such illegal presumptions.

The needs of assistance units residing with a non-recipient are budgeted upon the assumption that his income is available to meet their needs, despite "absence of proof of actual contributions." 45 C.F.R. §233.90(a). See pages 9-13, supra. Such awards are illegal, since the Department is barred from assuming, without opportunity for rebuttal, that the income of such an individual is available for the assistance unit's support. E.g., Van Lare vs Hurley, supra; Solman vs Shapiro, supra; King vs Smith, supra; Marotti vs White, supra. In consolidating the standard of need such budgeted amounts, based not upon need but upon illegal income presumptions, must be excluded. Roselli vs Affleck, supra.

D. THIS COURT SHOULD INVALIDATE CFAP, SINCE THE DEPARTMENT HAS FAILED TO SUSTAIN ITS "BURDEN TO JUSTIFY THE NEW SCHEDULES." ROSADO VS WYMAN, 437 F. 2d 619, 628 (2ND CIR. 1970), AFFIRMED, 402 U.S. 991 (1970).

CFAP has frozen into perpetuity the Department's illegal income presumptions, supra, at page 15, arbitrary system of maximum grants, supra, at pages 9-11, and illegal methods of determining need, supra, at pages 12-13. Upholding CFAP will ratify these policies and permit the Department, in violation of §602(a)(23), to "redefine its standard of need in such a way that it skirts the requirement of re-evaluating its existing standard." Rosado, supra, 397 U.S. at 415.

This Court should require the Department to fulfill the responsibilities mandated by 42 U.S.C. §602(a)(23). Those responsibilities can be met only by creation of a standard of need which indeed reflects recipients' needs, not budgeted awards which the Department has illegally equated with need, or which are premised upon maximum grants and illegal income presumptions. Roselli vs Affleck, supra.[9]

---

[9] The district court's contention, App. 56a, that the recipients failed to demonstrate they were "charged more for rent than the prorated maximums budgeted by the defendant," misses the mark. The recipients cannot be charged with any such failure. For it is the Department's burden to demonstrate that its method of determining need is based on "proof of actual contributions," 45 C.F.R. §233.90(a), rather than illegal income presumptions. See, Van Lare vs Hurley, supra. By their very definition, maximum grants and prorations of those maximums fall short of need. Supra, page 11. Similarly, since such grants are based on an assumption of income availability they represent, not need, but payment levels after such income is applied to the need standard. Supra, pages 12-15.

The district court rejected the recipients' offer of proof that they were in fact charged more for shelter than the awards budgeted by the Department. App. 65a, 68a. See §IV p.26, infra.

II. THE DEPARTMENT'S USE OF THE U.S. CITY AVERAGE CONSUMER PRICE INDEX, IN UPDATING AND REPRICING THE FACTORS OF NEED, VIOLATES §602(a)(23).

Congress required the states by July 1, 1969, to adjust the factors of the need standard in order "to reflect fully changes in living costs since such amounts were established", and similarly to adjust any maximums imposed upon grants to families. 42 U.S.C. §602(a)(23). HEW directed the states to select one of seven cost study methods for accomplishing this adjustment. App. 99a-101a. The Department chose Method B App. 58a, a utilization of "the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, for the appropriate region..." (emphasis added). Id., App. 99a.

HEW asserted, and the district court held, App. 58a,

> "that where a state such as Connecticut does not contain one of the 23 Standard Metropolitan Statistical Areas for which there are individual city indexes then the use of the U.S. City Average Index will satisfy the requirement of using the CPI for the 'appropriate region'".

HEW Brief at 6.

This holding conflicts with §602(a)(23). States must update and reprice the factors of need in order to "lay bare the extent to which their programs fall short of fulfilling actual need." Rosado vs Wyman, supra, 397 U.S. at 413. In so adjusting the factors of need a state "may not obscure the actual standard of need." Id. The Department's use of the U.S. City Average Index in fact obscures "the actual standard of need," since Connecticut has one of the highest

costs of living for low income families, and one of the highest rates of increase in the cost of living. Cost studies demonstrate that the U.S. City Average Index seriously understates changes in living costs in Connecticut and the northeastern United States.

"From December 1966 through December 1972, the indexes for all items and for all subgroups of goods and services increased (in percentage terms) more in the Northeast region than in any of the other three:

"

	United States	Northeast	North Central	South	West
All Items	29.1	32.4	27.6	28.3	25.7
Food	26.4	28.7	25.7	26.2	23.5
Housing	32.7	37.2	28.9	33.3	30.7
Apparel and Upkeep	26.9	28.2	26.9	26.6	24.7
Transportation	23.5	29.2	23.2	19.6	20.3
Health and recreation	30.5	33.8	31.2	29.9	23.9

"

Nakayama, "Measuring Regional Price Change in Urban Areas," U.S. Dept. of Labor, Bureau of Labor Statistics, Monthly Labor Review (October 1973), p. 34.

Moreover, yearly December-to-December changes in the all-items CPI for all regions demonstrate that the highest rate of change has occurred in the Northeast:

DECEMBER TO DECEMBER CHANGES (In %) IN THE ALL ITEMS INDEX FOR ALL REGIONS*

	RATE OF INCREASE			
Area	1967	1968	1969	Total
United States	3.0	4.7	6.1	13.8
Northeast	2.7	5.2	6.4	14.3
North Central	3.3	4.3	6.2	13.8
South	2.9	5.0	6.2	14.1
West	2.9	3.8	5.4	12.1

Id. at 35.

Finally, studies by the U. S. Department of Labor, Bureau of Labor Statistics, "3 Standards of Living for an Urban Family of Four Persons", (1967), pp. 15-16; Id. (1969), demonstrate that Connecticut's rate of increase in the cost of living significantly exceeds the national average.

PRICE INCREASES IN THE LOWER BUDGET FOR AN URBAN FAMILY OF FOUR [10]

Area	Spring 1967	Spring 1969	%Change
U. S. Urban	$4,388	$4,746	8.2%
Hartford	$4,814	$5,238	8.8%

[10] The 1967 study observes, p. 40:

"Finally, for the lower standard, the total cost should not be interpreted as a goal or standard for public assistance or welfare programs. Our system of payments to dependent families in this country has been developed in the context of welfare legislation, concerned primarily about children in homes in which the breadwinner is absent, disabled, or unemployed for varying periods of time. The total cost of the lower budget, however, assumes that the source of family income is from employment and that the breadwinner's earnings are sufficient to provide the level of consumption described by the budget and to pay the amounts specified for social security and personal income taxes.

"The lower budget cost of consumption includes only those components of family living which are consumed directly by the family. Some of these costs are associated with the employment of the family head, for example, transportation to work, lunches away from home, work clothing, etc. Also, the provision for a group health insurance plan purchased through the husband's place of employment is not applicable in the framework of public assistance or welfare programs. Generally, therefore, the individual components of the cost of consumption in the lower budget will provide the basis for more realistic

Compliance with Method B requires the Department to utilize the northeast region CPI. Jackson vs Department of Public Welfare, 317 F. Supp. 1151, 1161 (M.D. Fla. 1970).[11] On remand the Department may, of course, choose t utilize a different cost study method, as outlined by HEW. App. 99a-101a. The recipients do not oppose any such option exercised by the Department, so long as it results in a realistic, accurately determined standard of need.

---

benchmark estimates for assistance goals or standards than will the published total cost of consumption (emphasis added)."

Consistent with this observation, the above Table excludes personal taxes (social security, disability, and unemployment compensation taxes), medical care, allowances for gifts and contributions, life insurance, and occupational expenses. Hence the Table reflects total lower budgets which "provide the basis for more realistic benchmark estimates for assistance goals or standards..."

11

In Jackson, the court held that the "appropriate region" requirement of Method B was satisfied by the Department's use of the southeastern region CPI, and rejected the contention that use of "figures for the nation as a whole" constituted compliance. 317 F. Supp. at 1161. Like Connecticut, Florida contains none of the 23 SMSA's for which there are individual city indexes. See, p.17, supra. See, also, Lampton vs Bonin, 304 F. Supp. 1384, 1386 n.3, 1390 (E.D. La. 1969) (updating to be based on statistics reflecting cost of living in Louisiana, since the "Department of Labor Index showing the increase in the cost of living is not based on figures derived from the costs of living in any Louisiana city"), vacated on other grounds, 397 U.S. 663 (1970).

III. THE DEPARTMENT CONSTRUCTED THE CONNECTICUT FAMILY ASSISTANCE PLAN PURSUANT TO IMPROPER STATISTICAL PROCEDURES.

A. The Department Erroneously Failed To Determine The Reliability of Each Factor of Need Upon Which Each Cost of Living Adjustment Was Based

The Department created CFAP by averaging, for each assistance unit size, each factor of need. The Department subsequently applied, to each such factor, a cost-of-living adjustment; and finally combined the factors of need to construct a consolidated standard of need for each assistance unit size. App. 52a-53a, 114a-116a.

The district court held that the Department had properly determined the statistical reliability of the consolidated standard of need for each assistance unit size "as a whole". App. 53a.[12] However, the Department failed to determine the reliability of each factor of need upon which each requisite cost-of-living adjustment was based. App. 53a, 54a. n.5.

---

[12] However, despite its expert's promise to do so, R.Doc.No.7, pp.34-35, the Department never filed with the district court a copy of the computer program verifying that the pre-sample confidence interval had been met "for the average of budgeted needs as a whole." App. 53a. Moreover, "for assistance unit sizes 10 through 15, the defendant averaged the budgeted needs for shelter, excess utilities, recurrent and non-recurrent needs, so that the standard of need as established by the CFAP is, with respect to these items, the same for a family of 10 as for a family of 15," App. 54a, thereby obscuring the standard of need for these assistance units. App. 65a, 67a.

The Department's failure to do so renders unreliable its method of adjusting each factor with reference to the cost of living.

Absent a determination of each factor's accuracy, the Department may have applied cost-of-living adjustments to factors which are themselves statistically unreliable.[13] If individual factors of need are not reliably "accounted for", Rosado vs Wyman, supra, 397 U.S. at 409, their reliable updating cannot be accomplished. The Department simply cannot satisfy §602(a)(23)'s cost-of-living mandate without verifying the accuracy of each factor of need. Having failed to sustain "its burden to justify the new schedules," Rosado vs Wyman, supra, 437 F. 2d. at 628, the Department must accurately and reliably determine the factors of need in order properly to compute the requisite cost-of-living adjustments.

The Department has contended, and the district court so held, App. 53a,54a, that the statistical techniques here employed accorded with procedures approved in Rosado vs Wyman, However, in Rosado none of the issues concerned §602(a)(23)'s cost-of-living mandate. As the Supreme Court recognized, "What is at the heart of this dispute is the elimination of special

---

[13] Indeed, Plaintiffs introduced evidence that for certain factors of need the survey results failed to satisfy the Department's pre-selected confidence interval. R.Doc.No.3, pp. 13-16, 27-29, 38-40. See, also, R.Doc.No. 73. See, also, App. 68a.

grants in the New York program." Rosado vs Wyman, 397 U.S. at 459. In New York, cost-of-living adjustments were made administratively each year in May. Rosado vs Wyman, 304 F. Supp.1356, 1370, (E.D.N.Y. 1969). See, also, Rosado v. Wyman, 414 F. 2d 170, 180 (2nd. Cir. 1969); Id., 322 F. Supp. at 1179-1181. In the absence of a cost-of-living issue, Rosado is not controlling. The recipients thus submit that this Court may write on a clean slate, and that the Department should be required to establish reliable, properly updated factors of need.

B. This Court Should Order The Department To Correct Certain Arithmetic and Ministerial Errors Committed In Its Construction of CFAP.

The Department committed the following arithmetic or ministerial errors in the course of its construction of CFAP:

1. The Department erroneously included an assistance unit size two in its averaging of assistance unit size ten, thereby understating the proper monthly award to unit size ten by approximately $15.00. See page 32 of this Brief;

2. The Department made a significant mathematical error in assistance unit size twelve, erroneously reducing unit size twelve's monthly grant. Id; R.Doc. 73.

3. Using the percentage change in a particular consumer price index from 1967 to 1969, the Department claimed that "The Consumer Price Index shows a 6.2% change in the cost of [household furnishings] from 1967 to 1969". HEW Brief, Exhibit E, page E-7. While it is unclear which CPI table the Department used, the most relevant CPI categories show a higher percentage increase:

ANNUAL URBAN AVERAGE

	1967	1969	% Change
Housefurnishings	100.8	109.0	8.13
Household Furnishings and Operation	108.2	117.9	8.96
Household Durables	98.2	105.5	7.43

(U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, December 1967, December 1969)

4. The Department updated the "personal incidentals" category of the factors of need from a base date of October 1, 1967. R.Doc. 3, pp. 89-96. However, the personal incidentals standard which was in effect on October 1, 1967, was established at least as early as October 1, 1963. Id. Consequently, this Court should require the Department to

compute the cost-of-living adjustment for "personal incidentals" from October 1, 1963, the date on which "such amounts were established." 42 U.S.C. §602(a)(23).

The recipients submit that this Court should order the Department to correct these enumerated arithmetic and ministerial errors.

IV. THE DISTRICT COURT ERRED IN CONSOLIDATING THE HEARING ON THE DEPARTMENT'S MOTION TO MODIFY THE PRELIMINARY INJUNCTION WITH THE TRIAL ON THE MERITS.

The district court consolidated the hearing on the Department's motion to modify the preliminary injunction, App. 45a, with the final trial on the merits:

> Although the case is presently before the court on the defendant's motion to terminate the preliminary injunction, the scope of the evidence presented at the hearing on that motion, covering every remaining issue in the case, makes it appropriate for the court to proceed to a final judgment on the merits. App. 52a.

The recipients were not notified that the hearing on May 23, 1972 was a final trial on the merits. Nor did the recipients or the Department agree, pursuant to Rule 65(a)(2) to consolidate the hearing with a final trial.

The district court erred in its consolidation decision.

This Court explained in Capital City Gas Company v. Phillips Petroleum Company, 373 F. 2d 128, 131 (2d Cir. 1967):

> "The noticed hearing upon temporary relief was never consolidated with a trial on the merits for permanent relief although the court considered evidence put in by both parties...(T)he parties were not made aware that final relief was to be granted. Because of the different scope of possible relief, the difference in types of evidence admissible, and the difference in burden of proof required...between permanent and temporary injunctive relief, a party is entitled to notice that permanent rather than temporary relief is being determined. Since Phillips was not given such notice in case, the permanent injunction must be vacated." 14

In Progress Development Corporation v. Mitchell, 286 F. 2d 222, 233 (7th Cir. 1961), Chief Judge Hastings commented:

14
See, Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971); Pughsley v. 3750 Lake Shore Drive Cooperative Building, 463 F. 2d 1055, 1157 (7th Cir. 1972); Brooks v. Nacrelli, 415 F. 2d 272, 275 (3rd Cir. 1969); Puerto Rican Farm Workers ex rel. Filipe Pegan Vidal vs Eatmon, 427 F.2d 210 (5th Cir. 1970). See, also, 11 Wright and Miller, Federal Practice & Procedure §2950, p. 486; 7 Moore's Federal Practice §65.04[4].

> No Plaintiff is required to prove his case on the merits at a preliminary hearing. The argument, after such a hearing on an equity issue, that no genuine issue of fact is disclosed is fallacious. If summary judgment is appropriate on this ground after a preliminary hearing only, then the preliminary hearing becomes in fact a trial on the merits and its whole purpose is lost.

See, T.M.T. Trailer Ferry Inc. v. Union DeTronquistas De Puerto Rico, Local 901, 453 F. 2d 1171, 1172 (1st Cir. 1971). Compare, Galella v. Onassis, 487 F.2d 986 (2nd Cir. 1973).

The premature termination of the litigation deprived the recipients of the opportunity fully to present evidence on all the issues. The recipients presented a case which counsel deemed sufficient to justify maintenance of the preliminary injunction, and to defeat the Department's motion to terminate the preliminary injunction. App. 45a. The district court observed that "[T]he plaintiffs, however, have offered no evidence that recipients in the categories described above are charged more for rent than the prorated maximums budgeted by the defendant". App. 56a. See p. 16n.9, supra. Without the improper consolidation, the recipients would have had the opportunity to present this evidence, as well as other evidence, App. 63a-69a, at the trial of the case.

After the entry of judgment, the recipients sought a hearing to present further evidence pursuant to Rules 52, 59, 60 and 62, F.R.Civ.P. App. 63a; and to have the Department of Health, Education and Welfare review evidence adduced at the May 23, 1972 hearing. This request was denied. App. 63a, 67a. The lack of review by HEW was particularly improper because of the great deference accorded its opinion by the district court. App. 51a, 53a, 58a, 59a.

The recipients submit that the foregoing constitutes sufficient prejudice, within the meaning of Capitol City Gas Company v. Phillips Petroleum Company, supra, and Galella v. Onassis, supra, as to require remand to the district court for a trial on the merits. Compare, Male v. Crossroads Associates, 469 F. 2d 616, 619, 620 (2nd Cir. 1972).

CONCLUSION

For the foregoing reasons the recipients, Plaintiffs-Appellants, respectfully request this Court to reverse the judgment and decision of the district court.

THE PLAINTIFFS-APPELLANTS,

Dated: June 23, 1975 By: David M. Lesser
David M. Lesser

William H. Clendenen, Jr.

CLENDENEN & LESSER
152 Temple Street
New Haven, Connecticut 06510

Douglas Crockett
Dennis O'Brien
P. O. Box D
Willimantic, Connecticut

CERTIFICATION:

This is to certify that a copy of the foregoing was mailed, postage prepaid, to:

Francis J. MacGregor, Esquire
Assistant Attorney General
75 Meadow Street
East Hartford, Connecticut 06108

on this 23 day of June, 1975.

David M. Lesser
David M. Lesser

ADDENDUM

Willimantic Office

January 24, 1974

Henry Boyle
Deputy Commissioner
State Welfare Department
1000 Asylum Street
Hartford, Connecticut

RE: Johnson v. White.

Dear Henry:

With Frank MacGregor's permission, I contacted you directly to see if it was feasible to conduct further negotiations on the Johnson v. White appeal. You indicated that you wanted to see some dollar-and-cents costs connected with our proposed settlement. This letter develops the potential costs which would be incurred by the department on an annual basis, if our proposed settlement was accepted.

At our last meeting, (attended by Richard Gertzoff, William H. Clendenen, Frank MacGregor, and me), the major cost factor identified by the department was the expense of reviewing individual files. It was felt at that time that the cost of reviewing the AFDC case files to implement the settlement would exceed the actual benefits which would be paid to the recipients.

However, there is a way to eliminate the necessity of an independent review of AFDC case files to implement a settlement of Johnson v. White. The department is in the process of undertaking

a six month face-to-face interview of each AFDC caretaker relative to recertify continuing eligibility for AFDC. At the face-to-face interview, the department not only plans to determine continued eligibility, but to explain full program content and the possibility for additional benefits and services for recipients. We propose that the settlement of Johnson v. White could be implemented as part of the six month recertification program. We hope that the elimination of this cost factor, which had been estimated at between $50,000.00 to $100,000.00 will enhance the probability of successful negotiations for settlement.

There are three primary areas where a change in the flat grant would produce final results acceptable to plaintiffs: (1) the elimination of an assistance unit size 2, which was incorrectly included within the sample survey for assistance unit size 10; (2) the correction of a keypunch error within the assistance unit size 12 calculations for FCPH; and (3) the creation of two flat grant payment schedules for households where the caretaker relative is not an AFDC recipient, and another payment schedule for households where the caretaker relative is a recipient.

(1) The sample survey for assistance unit size 10, included the household of Oliva Williams, Case No. 102-C-032013, which is actually an assistance unit size 2. This is clearly an error. The following chart summarizes the FAP calculations for assistance unit size 10 and the adjusted calculations when this incorrect assistance unit is removed from the sample.

	FAP	CORRECTED
FCPH	$375.94	$384.56
SHELTER	119.42	124.91
UTILITIES	38.88	40.29
TOTALS	$534.24	$549.76

The error caused by the inclusion of this incorrect unit is $15.52 per month. We did not calculate the error in recurrent and non-recurrent special needs since we estimate that error should be less than $1.00. The size of assistance unit size 10, as of February 18, 1972, was 140 cases. We thus estimate the cost to the department of correcting this error to be $2.172.80 per month, or $26,073.60 per year.

(2) A keypunch error which is reflected on the input tape to the flat grant program is contained in the tape record No. 3071. This error reflects an FCPH of $45.31 for the assistance unit identified by Case No. 015-C-843796. An examination of the 52T for this same case indicated that the correct FCPH is $453.10. This resulted in an error on the flat grant payment for assistance unit size 12 of $28.21 per month. Since our information indicates that as of February 16, 1972, there were 105 cases included within assistance units 11 through 15, in all probability there are no more than 40 assistance unit size 12s. The monthly cost of correcting this input error for 40 assistance units would be $1,128.40 per month, or $13,540.80 per year.

(3) The establishment of two flat grant payment schedules, one for assistance units with caretaker relatives who are not AFDC recipients and another for all other AFDC assistance units, would eliminate much of the hardship suffered under the flat grant and provide for a payment schedule which is more equitable in terms of each household's needs. Our suggested payment schedule would reflect higher payments for those households where the caretaker relative is included within the AFDC household, and a lower schedule for those households where the caretaker relative is not eligible for AFDC.

The differential in the schedules is based upon the difference in payments as reflected in the flat grant input tape for households equal to assistance unit size and households unequal to assistance unit size. In each and every 52T which we have examined, households unequal to assistance unit size have contained caretaker relatives who were not AFDC recipients. One of the objections raised by the department to a plan of two separate payment schedules for equal and unequal households was that it would create additional fraud cases where an ineligible individual resided in an AFDC household. By making the distinction one of a non-recipient caretaker relative, this problem is obviated.

The establishment of the dual schedules would foster one of the important objectives of the FAP, i.e., to allow flexibility in shelter arrangements so that living quarters can be shared by recipients and non-recipients without financial penalty.

The third proposal of establishing two separate flat grant schedules would incur minor costs for the department. Since the changes to individual assistance units could be implemented through the recertification program, costs of implementation would again be minimal. Richard Gertzoff's estimate was that the implementation costs, aside from the review of program folders, were minor.

If we can agree to a final settlement, the plaintiffs will drop their claim for rehearing as well as all other pending motions. The contemplated appeal of the court's final judgement would be precluded. As a result of such a settlement, the following issues would not be pursued by the plaintiffs: the inclusion of pro-rated shelter payments within the flat grant, statistical errors and the resulting unreliability of the data on which the flat grant was based, inclusion of erroneous zero rent assistance units within the flat grant sample, input errors in assistance units 10 and 12, and the statistical necessity for two separate payment schedules for equal and unequal households.

By settling now, both parties would be receiving something less than their highest expectations, but both would be avoiding the possibility of a final result which could be burdensome to either side. Of course the cost of additional litigation would be eliminated for both parties, as well as the possibility of extensive retroactive payments.

This is a priority matter for the recipients and we would request a response within 30 days. If meaningful negotiations have not commenced by this date, we would request Judge Blumenfeld to issue his decision on the motion to re-open, which he has been holding pending the outcome of negotiations.

Henry Boyle
Deputy Commissioner
January 24, 1974
Page Five.

Thank you for your time and consideration. I do hope we will be able to have a meeting with you and the Commissioner.

Very truly yours,

Douglas M. Crockett
William H. Clendenen
David M. Lesser

DMC:sg

cc: The Honorable M. Joseph Blumenfeld
United States District Judge
United States Courthouse
450 Main Street
Hartford, Connecticut 06103

The Honorable William Templeton
Deputy in Charge
Office of the Clerk
United States District Court
450 Main Street
Hartford, Connecticut 06103

Francis J. MacGregor, Esquire
Assistant Attorney General
75 Meadow Street
East Hartford, Connecticut 06108

Henry Cohn, Esquire
Assistant United States Attorney
450 Main Street
Hartford, Connecticut 06103

Sam Fish, Esquire
Regional Attorney
Department of Health, Education and Welfare
John Fitzgerald Kennedy Federal Building
Government Center
Boston, Massachusetts 02203